

No. 22607

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

APPELLANT'S REPLY BRIEF TO BRIEFS FOR AP-
PELLEES KATHRYN LILLARD WHEELER, AND
GLORIA WOOD IRVINE AND SECURITY PACIF-
IC NATIONAL BANK, AS EXECUTORS AND
TRUSTEES OF THE ESTATE OF MYFORD
IRVINE, DECEASED

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The defendants Kathryn Lillard Wheeler, Gloria Wood Irvine and Security Pacific National Bank, have taken an adverse position to the plaintiff and would have the court believe from the contents of their respective briefs that they are motivated in doing so by charitable and altruistic purposes. The record, however, discloses that their adverse interest to the plaintiff's action is based on their respective positions and the potential liability with which they are confronted as defendants in plaintiff's action. The defendant, Kathryn Lillard Wheeler, has been a member, director and trustee of the defendant foundation since 1950 and during this period

said defendant foundation has received dividends and capital gains on 459 shares of Irvine stock in the sum of approximately \$13,000,000.

Plaintiff in her amended complaint not only seeks the recovery of the 459 shares of Irvine stock for the heirs of James Irvine, deceased, but also seeks the recovery of said sum of \$13,000,000 as part of the trust fund which said defendant foundation holds on a resulting trust for the heirs of James Irvine, deceased. Plaintiff's action seeks a joint and several judgment against all of the individual foundation defendants for said sum of \$13,000,000. It is plaintiff's contention that whatever the defendant foundation has received under the 1937 indenture of trust must be accounted for as property which said foundation trustee holds on a resulting trust for the heirs of James Irvine, deceased. Therefore, the defendant Kathryn Lillard Wheeler faces a substantial financial liability which is involved in the outcome of the plaintiff's action, and this potential liability is the real basis for said defendant's adverse position to the plaintiff's action.

The same situation that applies to the defendant, Kathryn Lillard Wheeler, also confronts the defendant, Gloria Wood Irvine, and the Security Pacific National Bank, as the executors and trustees of the estate of Myford Irvine, deceased. Gloria Wood Irvine is not an heir of James Irvine, deceased, and is not a beneficiary under the will of said decedent and therefore said defendant would not participate in any recovery that results from the plaintiff's action. However, Myford Irvine was a member, director, trustee and president of the defendant foundation from the date of the death of James Irvine on August 24, 1947, to the date of Myford Irvine's death on January 11, 1959. Said estate of

Myford Irvine, deceased, therefore faces a joint and several liability under the plaintiff's action for the sum of \$13,000,000 which was received by said defendant foundation as dividends and capital gains on the 459 shares of Irvine stock.

Gloria Wood Irvine is also aligned with the interests of the defendant foundation for the reason that she is under moral obligation to said defendant because through the control of the Irvine Company by said defendant foundation, the Irvine Company purchased from the estate of Myford Irvine, deceased, 50 shares of stock of the Irvine Company for a sum in excess of \$5,000,000.

James Myford Irvine, the minor son of Myford Irvine and Gloria Wood Irvine, is an heir of James Irvine, deceased, and as such heir he would benefit substantially from the successful outcome of plaintiff's action.

The defendants' Kathryn Lillard Wheeler and Gloria Wood Irvine and Security Pacific National Bank, as executors and trustees of the estate of Myford Irvine, deceased, are further confronted with a potential liability to the United States Government as transferees who will be required to account to the Internal Revenue Service for all income taxes that are found to be due from the defendant foundation on all of the dividends and capital gains received by said defendant foundation since 1947 to date.

It is therefore understandable why the defendants, Kathryn Lillard Wheeler and Gloria Wood Irvine, who is not the mother of Linda Irvine Gaede, and the Security Pacific National Bank, stenuously oppose a judgment in favor of the plaintiff and the heirs at law of James Irvine.

The defendant Kathryn Lillard Wheeler as a witness at the trial of plaintiff's action renounced for herself any interest in the 459 shares of Irvine Company stock, which is the subject of the plaintiff's amended complaint. This same renunciation is again repeated in the brief of said defendant, Kathryn Lillard Wheeler, which has been separately filed in reply to the brief for appellant. (Tr. 3506-3546 incl.)

Respectfully,

LYNDOL L. YOUNG

Attorney for Plaintiff-Appellant
Athalie Irvine Smith